In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1245

HAROLD K. BAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with one Gurule in the United States District Court for the District of New Mexico, petitioner was convicted on nine counts of mail fraud involving fraudulent charges made to the Sante Fe Railroad, in violation of 18 U.S.C. 1341. On May 12, 1969, he was sentenced to three years' imprisonment to be followed by five years' probation. The court of appeals affirmed (Pet. App. A).

The evidence is summarized in the opinion below. In essence it showed that Gurule was an employee of the Santa Fe Railroad authorized to make purchases for the Railroad. He was also employed by Hills Auto Electric Company, a supplier for the Railroad.

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Petitioner was the manager of Hills Auto. Over the course of years, petitioner and Gurule carried on a scheme to defraud the Railroad by presenting a series of fictitious claims to the Railroad (which it paid) for purchases of goods. The Railroad's checks were mailed to Hills Auto. Petitioner received 3½ per cent of the proceeds of the fictitious sales.

The scheme was uncovered after Gurule sought to enlist another supplier who reported the offer to Gurule's supervisor, Leonard Roten. Roten checked the invoices to investigate for any dishonesty and then asked Gurule to resign. Roten testified about Gurule's response (Tr. 1047):

> Well, it was naturally a shock, but he said that that particular morning, he thought that he would never come to the place that he would think about taking his own life, and that he said that he had talked to his [p]riest that morning.
>
> Also, after that, he broke down and cried. He wanted to know how much money was involved, and he wanted to know if he could pay it back, and I told him that there was too much money for him to ever pay back, and of course, after that, he tried to get me to assure him that no one would find out; that we would just keep it quiet, and I told him that I had to make the report to my superior, Mr. Watson, and from there I could not say.

Subsequently Gurule took the stand and was cross-examined by petitioner's counsel about the alleged confession. He denied making the statements attributed to him by Roten. In his closing charge, the trial

judge refused to give a limiting instruction concerning Roten's testimony.

Petitioner's sole contention is that the introduction of Roten's testimony regarding Gurule's implicit confession violated the rule of *Bruton* v. *United States,* 391 U.S. 123. He argues that his confrontation right was infringed, notwithstanding his counsel's subsequent cross-examination of Gurule about what he had said, because Gurule's denial that he made any such statement allegedly made the cross-examination ineffective. Compare *California* v. *Green,* 399 U.S. 149, 168–170. There is presently a conflict in the circuits on the effect of an opportunity to cross-examine under such circumstances, which this Court has apparently undertaken to resolve. Compare *O'Neil* v. *Nelson,* 422 F. 2d 319 (C.A. 9), certiorari granted, November 9, 1970, No. 336, this Term, with *United States* v. *Sims,* 430 F. 2d 1089 (C.A. 6).

There is, however, no reason to hold this case pending the decision in *O'Neil* v. *Nelson, supra,* since the same issue need not be reached here. As the court below held (Pet. App. A, ix), the "testimony that might be considered as a confession * * * did not incriminate [petitioner], and as a matter of fact did not mention him. * * * Thus, it is evident that *Bruton, supra,* is inapposite." The courts of appeals have been consistent in holding that the principle of *Bruton* is not applicable where the co-defendant's confession does not implicate the complaining party. *Posey* v. *United States,* 416 F. 2d 545, 550–551 (C.A. 5), certiorari denied, 397 U.S. 946; *United States* v. *Lipowitz,* 407

F. 2d 597, 600–603 (C.A. 3), certiorari denied *sub nom. Smith* v. *United States,* 395 U.S. 946; *United States* v. *Gregg,* 414 F. 2d 943, 948–949 (C.A. 7), certiorari denied, 399 U.S. 934.[1] Moreover, since petitioner was not implicated in any way by Gurule's admissions, the refusal of the trial judge to give a limiting instruction was correct or at most harmless error. See *United States* v. *Gregg, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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[1] Petitioner argues that since he was connected to Gurule through independent evidence, the effect of Roten's testimony about Gurule's purported statements was damaging to his case. However, *Bruton* dealt only with the problem of a powerfully incriminating statement implicating the accused; it should not be extended to the attenuated circumstance where a co-defendant's confession can implicate a defendant only through the elaborate use of independent evidence. See our Memorandum in Opposition in *Gregg* v. *United States, supra,* No. 878 Misc. O.T. 1969, p. 5, a copy of which we are sending to petitioner's counsel.

U.S. GOVERNMENT PRINTING OFFICE: 1971